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No. 78-911

IN THE

Supreme Court of the United States

October Term, 1978

INDUSTRIAL UNION DEPARTMENT, AFL-CIO,
Petitioner,

v.

AMERICAN PETROLEUM INSTITUTE, CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, MANUFACTURING CHEMISTS ASSOCIATION, NATIONAL PETROLEUM REFINERS ASSOCIATION, AMERICAN PETROFINA INCORPORATED, ATLANTIC RICHFIELD COMPANY, CITIES SERVICE COMPANY, CONTINENTAL OIL COMPANY, DELTA OIL COMPANY, EXXON CORPORATION, GULF OIL COMPANY, MARATHON OIL COMPANY, PHILLIPS PETROLEUM COMPANY, SHELL OIL COMPANY, SOUTH HAMPTON OIL COMPANY, STANDARD OIL COMPANY (Indiana), STANDARD OIL COMPANY OF OHIO, SUN OIL COMPANY OF PENNSYLVANIA, SUN OIL COMPANY OF DELAWARE, TEXACO INC., UNION OIL COMPANY OF CALIFORNIA

RUBBER MANUFACTURERS ASSOCIATION, INC., FIRESTONE TIRE & RUBBER COMPANY, GENERAL TIRE & RUBBER COMPANY, B. F. GOODRICH COMPANY, GOODYEAR TIRE & RUBBER COMPANY

E. I. DUPONT DE NEMOURS AND COMPANY

ARMSTRONG RUBBER COMPANY AND UNIROYAL COMPANY

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA

AMERICAN IRON AND STEEL INSTITUTE, BETHLEHEM STEEL CORPORATION, CYCLOPS CORPORATION, JONES AND LAUGHLIN STEEL CORPORATION, NATIONAL STEEL CORPORATION, REPUBLIC STEEL CORPORATION, SHENANGO INCORPORATED, UNITED STATES STEEL CORPORATION
and

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner Industrial Union Department, AFL-CIO (hereinafter "IUD") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on October 5, 1978.

OPINIONS BELOW

The opinion of the court of appeals is reported at 581 F.2d 498 and is reprinted as Appendix A in a separate Appendix accompanying this petition. The Occupational Safety and Health Standard governing "Occupational Exposure to Benzene" and the Statement of Reasons of the Secretary of Labor issued with the standard are reported at 43 Fed. Reg. 5918 and are reprinted as Appendices B and C. The amendment to the standard is reported at 43 Fed. Reg.

27962 and is reprinted as Appendix D. The order of the court of appeals consolidating the petitions to review the amendment with the petitions to review the standard is unreported and is reprinted as Appendix E. The judgment of the court of appeals is reprinted as Appendix F.

JURISDICTION

The Court of Appeals' judgment issued on October 5, 1978. (App. F). On November 1, 1978, the Court of Appeals consolidated the petitions to review the amendment to the standard with the petitions to review the standard (App. E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The Occupational Safety and Health Act delegates to the Secretary of Labor the power to adopt standards governing the exposure of working men and women to toxic materials and directs the Secretary to "set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life." In enacting this law, did Congress intend to preclude the Secretary from promulgating a regulation limiting workers' exposure to a proven carcinogen until such time as substantial evidence becomes available from which to quantify the number of lives that would be saved by the proposed regulation?

STATUTORY PROVISIONS INVOLVED

The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. provides in pertinent part:

§ 651. Congressional statement of findings and declaration of purpose and policy

(a) The Congress finds that personal injuries and

illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.

(b) The Congress declares it to be its purpose and policy, through the exercise of its powers to regulate commerce among the several States and with foreign nations and to provide for the general welfare, to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources—

* * *

(3) by authorizing the Secretary of Labor to set mandatory occupational safety and health standards applicable to businesses affecting commerce, and by creating an Occupational Safety and Health Review Commission for carrying out adjudicatory functions under this chapter . . .

§ 652. Definitions

* * *

(8) the term 'occupational safety and health standard means a standard which requires conditions or the adoption or use of one or more practices, means methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

§ 655. Standards

(b)

* * *

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of

the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

* * *

(f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

STATEMENT OF THE CASE

This case concerns the validity of the regulation governing occupational exposure to benzene promulgated by the Secretary of Labor ("the Secretary") pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ("the Act"). Benzene is one of the most widely produced chemicals in the United States, and the amount produced is rapidly increasing. Most benzene is used as an ingredient in the production of other organic chemicals; the remaining amount is used primarily in the manufacture of detergents, pesticides, solvents and paint removers, and as a component of motor fuels. Benzene has long been recognized as a toxic substance.

Shortly after the Act became effective, the Secretary promulgated a "national consensus standard" limiting the amount of benzene to which employers could expose their

employees.[1] Under that standard a permissible exposure level for benzene was established of 10 parts per million (ppm) as an 8-hour time weighted average, with a maximum permissible peak concentration of 50 ppm for 10 minutes in any 8-hour period. This standard was adopted from the consensus standard developed by the American National Standards Institute, and was based on evidence linking benzene to certain blood disorders such as aplastic anemia, but not on what was then considered the possible carcinogenic effects of exposure to benzene.

In August, 1976, the National Institute for Occupational Safety and Health ("NIOSH"), which was established by § 22 of the Act, 29 U.S.C. § 671, and directed to "develop and establish recommended occupational safety and health standards," found "the accumulated evidence to be conclusive at this time that benzene is leukemogenic"—*i.e.*, that it causes leukemia, an irreversible, fatal cancer of the white blood cells. In accordance with its conclusion, NIOSH recommended that the existing consensus standard (which, as noted above, was not based on the leukemogenic effects of benzene exposure), be modified to take account of the newly-

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[1] Section 3(9), 29 U.S.C. § 652(9), defines a "national consensus standard" as:

> any occupational safety and health standard or modification thereof which (1) has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

Under § 6(a), 29 U.S.C. § 655(a) the Secretary was required "as soon as practicable" within the first two years after the Act became effective to promulgate as a legally binding regulation "any national consensus standard" unless the Secretary determined that the promulgation of such a standard "would not result in improved safety or health for specifically designated employees."

obtained evidence establishing benzene as a leukemogen. Specifically, NIOSH recommended that "since it is not possible at this time to establish an exposure level at which benzene may be regarded to be without danger . . . exposure to benzene be kept as low as possible." NIOSH concluded that 1 ppm was the lowest level to which exposure could be reduced "at this time" and suggested that the exposure limit be set at that level.[2] NIOSH further recommended that an emergency temporary standard be promulgated[3] establishing the 1 ppm limit.

On May 3, 1977, the Secretary issued an emergency temporary standard as proposed by NIOSH.[4] Shortly thereafter the Secretary, as required by § 6(c) (3) of the Act, 29 U.S.C. § 655(c) (3), initiated rulemaking proceedings to develop a new, permanent standard. A proposed rule, incorporating the emergency temporary standard, was published in the Federal Register along with a lengthy explanation, incorporating the preamble to the temporary standard.

[2] Two years earlier, NIOSH had concluded that "the possibility that benzene can induce leukemia cannot be dismissed," but had not recommended any change in the national consensus standard in light of what it viewed as the then-uncertain link between benzene and leukemia.

[3] Section 6(c)(1) of the Act, 29 U.S.C. § 655(c)(1), directs the Secretary to adopt, without going through rulemaking proceedings, "an emergency temporary standard to take immediate effect upon publication . . . if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful . . . and (B) that such emergency standard is necessary to protect employees from such danger."

[4] The emergency temporary standard was never enforced. Petitions for review of the standard were filed first in the District of Columbia and then in the Fifth Circuit. The Fifth Circuit issued a stay of the standard pending the decision of the D.C. Circuit as to whether the petition filed with it was premature. That decision was not issued for almost six months, at which time the statutory life of the emergency standard had virtually lapsed. See 29 U.S.C. § 655(c)(2),(3).

42 Fed. Reg. 27452-59. At the same time, notice was given that an informal public hearing would be conducted beginning on July 19, 1977, and interested persons were invited to "submit written data, views and arguments" and "oral testimony" with respect to the issues raised by the emergency standard and the proposed permanent standard. *Id.* at 27459.

The public hearings on the proposed standard were held as scheduled.[5] A total of 95 persons testified, including representatives of and medical and technical experts retained by various employers and labor organizations, and independent experts from public health organizations (such as representatives of NIOSH and of the National Cancer Institute) presented by the Occupational Safety and Health Administration ("OSHA"). Each witness was subject to cross-examination by all interested parties. The hearings extended over seventeen hearing days, at the end of which interested parties were provided with an opportunity to submit additional written evidence and briefs. In all, the hearing transcript consumes over 3400 pages, and in addition over 1400 exhibits and comments were made a part of the record.

Although Congress anticipated that the Secretary would be able to issue standards within 60 days after the close of the standard-setting record, see 29 U.S.C. § 655(b)(4), the Secretary took over four months to study the benzene rec-

[5] The Act does not specify the nature of the informal hearing required by § 6(b)(3), 29 U.S.C. § 655(b)(3). By regulation the Secretary has provided that:

> The oral hearing shall be legislative in type. However, fairness may require an opportunity for cross-examination on crucial issues. The presiding officer is empowered to permit cross-examination under such circumstances. The essential intent is to provide an opportunity for effective oral presentation by interested persons which can be carried out with expedition and in the absence of rigid procedures which might unduly impede or protract the rulemaking process. 29 C.F.R. § 1911.15 (a)(2).

ord. On February 10, 1978, the Secretary promulgated a new benzene standard lowering the permissible exposure level to what he determined to be the lowest feasible level—1 ppm. At the same time, the Secretary issued a comprehensive Statement of Reasons which takes up 45 pages in the Federal Register. App. at 67a-251a.[6]

In the Statement of Reasons the Secretary made a number of findings and conclusions of critical importance to this case. First, the Secretary found that

> "the accumulated evidence is conclusive that benzene exposure is causally related to the induction of leukemia (a cancer of the blood-forming system), various cytopenias (decreased levels of a formed element [red cells, white cells, and platelets] in the circulating blood), aplastic anemia (a non-functioning of bone marrow) and to the development of chromosomal aberrations." [*Id.* at 81a].

With particular regard to the leukemogenic properties of benzene, the Secretary reported that from the published literature alone one scientist had been able to identify at least 250 cases in the United States in which workers had contracted leukemia as the result of benzene exposure. *Id.* at 121a. The Secretary further reported that a series of retrospective studies of groups of benzene-exposed workers had found the rate of leukemia deaths among these persons to be many times higher than the leukemia death rate in the population as a whole. *Id.* at 99a-119a. And the Secretary correctly noted that even "[i]ndustry participants in the benzene rulemaking did not, for the most part, challenge benzene's leukemogenicity." *Id.* at 123a.

[6] On June 27, 1978, the Secretary published in the Federal Register an amendment to the standard which, *inter alia*, exempted from the standard all work operations in which the exposure to benzene derives solely from liquids containing .5% or less of benzene by volume. App. at 252a. Petitioner herein and several of the respondents herein filed petitions seeking review of the amendment. Subsequent to the issuance of its decision invalidating the standard the court *sua sponte* consolidated the petitions to review the amendment with the petitions to review the standard, thereby disposing of the former petitions. The judgment challenged here thus encompasses the dismissal of IUD's petition to review the amendment.

With respect to the industry participants' contention that at low exposure levels benzene is safe, the Secretary concluded, as had NIOSH, see p. 6, *supra*, and numerous experts quoted by the Secretary, App. at 184a-86a,[7] that there is no evidence to support that claim. *Id.* at 123a-25a, 182a-87a. The Secretary explained that because of the long latency period for cancers generally and the variability in individual sensitivity to carcinogens, determining whether low levels of benzene are harmless would require studying the mortality rates of large groups of workers who could be shown to have been exposed to low levels of benzene up to 30 years earlier. The Secretary found that "to reconstruct and define employees' exposure retrospectively" and then to trace the exposed population for a prolonged period of time is "extremely difficult" and that because of these and other difficulties there are no reliable studies. *Id.* at 124a, 182a. Indeed, the Secretary concluded that "there does not exist an adequate scientific basis for establishing the quantitative dose-response relationship between exposure to benzene and the induction of leukemia and other blood diseases [*i.e.*, the number of persons who will be made ill by various incremental doses of benzene]." *Id.* at 160a. But the Secretary did find that there is "general agreement that a dose-response relationship is likely to exist; that is, exposure to higher doses carries with it a higher risk of cancer, and conversely, exposure to lower levels is accompanied by a reduced risk, even though a precise quan-

[7] The Secretary quoted reports in the record by the National Cancer Institute's Ad Hoc Committee on the Evaluation of Low Levels of Environmental Carcinogens, the International Workshop on the Toxicology of Benzene, the MAK-Werte Working Group, and the testimony of Drs. Kraybill (of the National Cancer Institute), Goldwater (testifying for respondent Manufacturing Chemists Association) Goldstein, and Aksoy.

titative relationship cannot be established." *Id.* Thus, the Secretary concluded that it "is apparent . . . that a decrease in exposure level and/or duration will result in a decreased risk of leukemia." *Id.* at 183a.

Based on all of these findings—and given the large number of workers exposed to benzene—the Secretary decided, as he has consistently done in regulating carcinogens, that "prudent public health policy" requires that the permissible exposure level for benzene be set as low as feasible. The Secretary concluded that the decreased risk to the health of workers that would be achieved by so reducing the exposure level justified this decision.

The Secretary recognized that the absence of evidence as to the precise effects of exposure to low levels of benzene "place[d] the estimation of benefits [from the reduced exposure level] on 'the frontiers of scientific knowledge.'" *Id.* at 160a. Even without an exact estimate of the number of lives to be saved, however, the Secretary was still able to conclude, based on the evidence establishing that reducing the exposure to benzene would reduce the risk of leukemia and other blood disorders faced by thousands of workers, that the lower exposure level is "necessary in order to effectuate the statutory purpose of the Act and to adequately protect employees from the hazards of exposure to benzene." *Id.* at 163a.

Immediately upon the issuance of the standard (and Statement of Reasons) a number of trade associations representing producers and users of benzene as well as individual companies that produce or use benzene[8] sought review of the standard under § 6(f) of the Act, 29 U.S.C. § 655(f).[9] The cases were consolidated in the Fifth Circuit

[8] All parties who sought review of the standard below are listed as respondents on the cover of this petition.

[9] Section 6(f) provides:

> (f) Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. . . . The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

and were heard on an expedited basis. On October 5, 1978, a division of that Circuit issued its opinion vacating the permissible exposure level for benzene, and with it the entire benzene standard.

In overturning the benzene standard the court of appeals did not disturb the Secretary's findings as to the dangers posed by benzene, the absence of a known safe exposure level to this poison, or the beneficial impact that a reduction of the exposure level would have. To the contrary, the court acknowledged that the Secretary's conclusion "that the standard is likely to result in benefits is not unsupported." App. at 18a. The court concluded that the record "provides substantial evidence which would support the finding that exposure to benzene at the present level of 10 ppm poses some leukemia risk," *id.*, and the court further found that "[t]he general agreement in the scientific community that exposure to carcinogens at low levels is safer than exposure at higher levels permits the further factual deduction that reducing the permissible exposure limit from 10 ppm to 1 ppm will result in some benefits," *id.*[10] What the court held, quite simply, was that these findings by the Secretary were not sufficient to sustain the regulation. Rather, the court concluded, the Secretary also was required to make a specific "estimate of benefits supported by substantial evidence." *Id.* at 19a-21a. Since the Secretary had not done so because in his view present scientific knowledge did not permit such an estimate, the court found that the standard could not survive.

[10] The court also left undisturbed the Secretary's finding that reducing benzene exposure to 1 ppm was feasible.

The court of appeals candidly acknowledged the necessary consequence of its decision: it has disabled OSHA from adopting a standard more stringent than the preexisting national consensus standard for benzene, notwithstanding the fact that in the court's own words "exposure to benzene at the present level . . . poses some leukemia risk." The court expressly rejected "OSHA's argument that this standard should be upheld since the lack of knowledge concerning the effects of exposure to benzene at low levels makes an estimation of benefits from reducing the permissible exposure level impossible." *Id.* at 19a. Accordingly, the court concluded that "[u]ntil such estimates [of the extent of benefits expected from reducing the permissible exposure level from 10 ppm to 1 ppm] are possible," OSHA will be barred from acting.[11] *Id.* at 21a,

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN SQUARE CONFLICT WITH DECISIONS OF THREE OTHER CIRCUITS

The Fifth Circuit's decision is in direct conflict with *Industrial Union Department* v. *Hodgson*, 499 F.2d 467 (D.C. Cir. 1974), *Society of Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301 (2d Cir.), *cert. denied*, 421 U.S. 922 (1975); and *American Iron and Steel Institute* [*AISI*] v. *OSHA*, 575 F.2d 825 (3rd Cir. 1978). Indeed, the court below recognized this conflict but expressly declined to "attempt to reconcile" its decision "with the cases from other circuits which uphold other standards regulating exposure to carcinogens." App. at 21a. And those cases cannot be so reconciled. For each upheld an OSHA standard limiting exposure to a carcinogen on findings by the Secretary ana-

[11] In the course of so concluding the court dropped the following telling citation: "*But see Society of Plastics Industry, Inc.* v. *OSHA*, 509 F.2d 1301, (2d Cir. 1975)." *Society of Plastics Industry*, the decision upholding OSHA's regulation of vinyl chloride, is discussed at pp. 14-15 *infra*.

lytically indistinguishable from the findings on which the standard at issue here was based.[12]

In *Industrial Union Department, supra,* the District of Columbia Circuit reviewed the validity of an OSHA standard governing exposure to asbestos dust. The standard was promulgated at a time when, in the court's words, "reliable data [was] not available with respect to the precisely predictable health effects of various levels of exposure to asbestos dust." 499 F.2d at 475. Unlike the court below, which held (with respect to benzene) that the Secretary was disabled from acting until such evidence becomes available, the District of Columbia Circuit unanimously found no infirmity in the regulation. Writing for the court, Judge McGowan reasoned that in delegating authority to promulgate occupational health standards to the Secretary, Congress had intended to authorize the Secretary to make decisions which implicate questions "on the frontiers of scientific knowledge" as to which "insufficient data is presently available to make a fully informed factual determination." *Id.* at 474. With respect to such decisions, Judge McGowan concluded that Congress had vested in the Secretary the power to make "a prediction based upon pure legislative judgments." *Id.* Accordingly, the court found the asbestos standard law-

[12] The decision below is also inconsistent with decisions that have been rendered under numerous other statutes upholding an administrator's authority to regulate carcinogens without waiting for conclusive evidence establishing the extent of harm that the carcinogen is likely to cause at the levels being regulated and thus the extent of benefits likely to result from the regulation. See, e.g., *Environmental Defense Fund* v. *EPA*, No. 77-1091 at 54-58 (D.C. Cir., Nov. 3, 1978) (Tamm, J.) (Federal Water Pollution Control Act amendments); *Certified Color Manufacturers Ass'n.* v. *Mathews*, 543 F.2d 284, 297-98 (D.C. Cir. 1976) (Wilkey, J.) (Federal Food, Drug and Cosmetic Act); *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 24-25 (D.C. Cir. 1976) (en banc) (Clean Air Act); *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 527-29 (8th Cir. 1975) (en banc) (Federal Water Pollution Control Act).

ful notwithstanding the absence of evidence as to the extent of the benefits that would be realized, since "the protection of the health of employees is the overriding concern of OSHA," and the Secretary's determination "over strong employer objection [to set] a relatively low limit * * * rests in the final analysis on an essentially legislative policy judgment rather than a factual determination concerning the relative risks of underprotection as compared to overprotection." *Id.* at 475.

In *Society of the Plastics Industry, Inc., supra*, the vinyl chloride case, the Second Circuit reached a decision in accord with *Industrial Union Department* and equally in conflict with the decision below. In *Plastics Industry* the employers challenged the vinyl chloride standard on the ground

> that the available scientific medical evidence does not establish that the 1 ppm exposure level adopted by the Secretary is required by health or safety considerations. They claim[ed] that no proof exists in the record to justify such a low standard, since all of the medical witnesses testified that no one can say whether exposure sure to [vinyl chloride] at low levels was safe or unsafe. [509 F.2d at 1308.]

Writing for the court, the late Mr. Justice Clark rejected that argument, concluding "that the evidence is quite sufficient to warrant the Secretary's choice," notwithstanding the absence of data as to the effects of exposure to low levels of vinyl chloride. *Id.* Mr. Justice Clark explained:

> As in *Industrial Union Department, AFL-CIO* v. *Hodgson, supra*, the ultimate facts here in dispute are 'on the frontiers of scientific knowledge,' and though the factual finger points it does not conclude. Under the command of OSHA it remains the duty of the Secretary to act to protect the workingman, *and to act even in circumstances where existing methodology or research is deficient.* The Secretary . . . has chosen to reduce the permissible level to the lowest detectable one.

> We find no error in this respect. [Emphasis added.] [18]

Finally, in *American Iron and Steel Institute* [*AISI*], *supra*, the Third Circuit, per Judge Rosenn, also upheld an OSHA standard requiring that exposure to a proven carcinogen—in that case coke oven emissions—be reduced to the lowest level that is technically and economically feasible. The Court concluded that the Secretary's findings that coke oven emissions are carcinogenic and that there is no known safe exposure level to them is sufficient to sustain the standard. In the course of its opinion the court explained:

> The Secretary's decision to establish a .15 mg/m^3 exposure level . . . was a policy judgment on the basis of the best available evidence as to what the industry could achieve in an effort to best protect its coke oven employees. This decision is not a f .tual determination for which we need to find substantial evidence in the record to support. Under the Act, the Secretary's task combines elements of legislative policy determinations and fact finding. . . . In this instance his ultimate determination of the appropriate exposure level is a legislative decision in the exercise of congressionally delegated powers. [577 F.2d at 833.]

The conflict created by the decision below requires immediate resolution. There are presently pending before courts of appeals challenges to three OSHA standards involving toxic substances: inorganic arsenic (before the Ninth Circuit); cotton dust (before the District of Columbia Circuit); and lead (before the Fifth and Third Circuits). In each case the Secretary was unable to determine the precise effect of low level exposure to the particular substance and thus to make the finding required by the Fifth Circuit (but not by the other circuits) as to the extent of benefits that will result from reducing exposure to the lowest feasible level. The validity of those standards, each of which affects hundreds of workplaces and thousands of workers, thus depends upon how the question presented here is resolved.

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[18] This is the portion of *Plastics Industry* that the court below cited as contrary to its holding. *See* n. 11 *supra*.

Moreover, the standards presently under review are only the first of the standards that must be set to regulate the myriad of carcinogens in the workplace. If the Court does not settle the question presented here as to the Secretary's power to issue standards regulating carcinogens, the Secretary will be unable to get on with the congressionally mandated job of protecting the health of American workers. As matters now stand, employer organizations, by filing the first instituted review petition in the Fifth Circuit, will be able to use the decision below to defeat the Secretary's power to issue each new standard. Employers will be unable to do so, however, if the first petition is filed in the District of Columbia, Second or Third Circuits.[14] The mischief created by this situation was recently highlighted by a courthouse race which ended in a dead heat when those who thought the new standard governing occupational exposure to lead went too far filed in the Fifth Circuit while those who felt the standard did not go far enough simultaneously filed in the Third Circuit.

[14] Under § 6(f), see n. 9 *supra*, any person "adversely affected" by an OSHA standard can bring a pre-enforcement petition to review the standard in the circuit in which such person "resides or has his principal place of business." This means that every standard which impacts upon an employer in the Fifth Circuit—which is to say every OSHA standard—could be challenged before that court if employer groups arrange their filings so that the first review petition is filed by an employer in the Fifth Ciruit, and if no other aggrieved group first files for review elsewhere. (Under 28 U.S.C. § 2112(a) all challenges to an agency's orders are to be transferred to and heard by the court in which the first challenge is filed.)

II. THE DECISION BELOW INCORRECTLY DECIDES AN IMPORTANT ISSUE OF FEDERAL LAW WHICH OUGHT TO BE RESOLVED BY THIS COURT.

The court of appeals' decision requiring the Secretary before promulgating a regulation lowering the permissible exposure level for a carcinogen to estimate with some precision the number of workers who thereby would be saved from contracting cancer is inconsistent not only with the decisions of three other circuits; the court's decision is also at war with the language, history and purpose of the Act itself, as we proceed to show.

The purpose of the Act is stated in its preamble: "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651. Of particular concern to Congress in enacting this statute was what Representative Daniels, the floor manager of the bill in the House, aptly called the "on-the-job pollution crisis"—that is, the fact that there are "millions of . . . men and women in our workforce whose lives are daily being placed in jeopardy from chemicals, insecticides, and pesticides."[15] The method Congress adopted to deal with this "crisis" was to delegate to the Secretary of Labor broad discretion to promulgate "occupational safety and health standard[s]," 29 U.S.C. § 655(b), and to impose upon employers the duty to "comply with occupational safety and health standards [thus] promulgated," *id.* § 654(a)(2).

Congress defined in express terms the substantive criteria by which the Secretary is to exercise the power delegated

[15] The Subcommittee on Labor of the Senate Committee on Public Welfare has published a compilation of the Act's legislative history entitled, *Legislative History of the Occupational Safety and Health Act of 1970*. Representative Daniels' statement appears at pp. 1002-03.

to him. Those criteria are set forth in § 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), which provides in pertinent part:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection shall set the standard which *most adequately assures*, to the extent feasible, on the basis of the *best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.* [Emphasis added.]

Under § 6(b)(5) the Secretary is thus required to regulate occupational exposure to a toxic material when he concludes from the "best available evidence" that absent such regulatory action employees will suffer material impairment of health from regular exposure to the particular toxic substance. That section does not leave room for an interpretation that would render the Secretary powerless to act in such circumstances until further evidence becomes available showing how many employees will suffer health impairments. Yet that is precisely what the holding of the court below requires.

The Fifth Circuit was of the view that it was unnecessary to reconcile its holding with the substantive criteria set forth in § 6(b)(5). See App. at 15a-16a, 21a. The court apparently believed it was relieved of that burden by a subsection of the general definitional section of the Act. That subsection, § 3(8), 29 U.S.C. § 652(8), defines an "occupational safety and health standard" as a standard "which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." The court below thought that without a finding as to the extent of benefits that will result from an OSHA standard, the Secretary could not "determine that [the] standard . . . is reasonably necessary."[16] But § 3(8) does

[16] The court below pointed to nothing in the legislative history of the Act or in the cases interpreting it to support the court's interpretation of § 3(8). Instead, the court relied entirely on its own decision in *Aqua Slide 'N Dive* v. *Consumer Product Safety Comm.* [*CPSC*], 569 F.2d 831 (1978). But that decision involved interpretation of a very different Act with very different language and a very different history applied to a very different problem. The question in *Aqua Slide* was whether the CPSC could require a particular label—one warning users of swimming pool slides of the danger of becoming paralyzed through improper use—without making a determination as to whether anyone was likely to heed such a warning—a determination which plainly is not on the frontiers of scientific knowledge. In holding that such a finding was required, the court relied on the peculiar language of 15 U.S.C. § 2058(c)(2)(A) which compels the CPSC, before promulgating a regulation, to find that the regulation is "reasonably necessary to eliminate or reduce *an unreasonable risk of injury*" and on the special legislative history of that section. See 569 F.2d at 839-40. Thus, whatever its merits, *Aqua Slide* sheds no light on the meaning of § 3(8).

not state that a standard must, in the abstract, be "reasonably necessary"—whatever that might mean. Rather, the Act declares that a standard must be reasonably necessary or appropriate to achieve a *particular end*. That end is the one stated in § 6(b)(5): to provide the most adequate assurance feasible that *no* employee will suffer health impairment from exposure to the substance being regulated, even if the employee's exposure is both regular and prolonged. The Secretary can determine what is reasonably necessary or appropriate to provide that assurance without a finding as to the number of employees who would otherwise actually suffer a health impairment. Thus the language of §§ 3(8) and 6(b)(5) cuts against, not for, the decision below.

Further, the interpretation of the statute just set forth, but not the Fifth Circuit's interpretation, is consistent with Congress' intent in enacting this law. The Fifth Circuit has read into the Act a requirement that would preclude the Secretary from regulating any carcinogen until he is able to resolve an issue on the "frontiers of science": the extent

to which exposure to low levels of carcinogens causes cancer (and thus the extent of the benefits that would be realized by regulating low level exposures). Yet in adopting the Act Congress expressly authorized the Secretary to act on the basis of *available* evidence and declared it "vital" that the Secretary not "be paralyzed by debate surrounding diverse medical opinions."[17] The importance of avoiding such paralysis was recently explained by Judge Tamm:

> What scientists know about the causes of cancer is how limited is their knowledge. The record in this case demonstrates that it may take decades for human exposure to result in cancer; in the meantime, the case for inferring a cancer danger with respect to an incompletely understood substance is vigorously disputed. If regulation were withheld until the danger was demonstrated conclusively, untold injury to public health could result.[18]

The court below thus was wrong in holding that the Secretary lacked sufficient information to restrict the exposure of employees to benzene to the lowest feasible level.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

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[17] H.R. Rep. No. 91-1291 at 18, in *Legislative History, supra* note 15, at 848.

[18] *Environmental Defense Fund* v. *EPA*, No. 77-1091, Slip. op. at 57-58 (D.C. Cir., Nov. 3, 1978).